

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DANIEL M. O'CONNELL
Claimant

VS.

WEBER REFRIGERATION AND HEATING
Respondent

AND

CONTINENTAL WESTERN INS. CO.
Insurance Carrier

Docket No. 1,000,678

ORDER

Claimant requested review of the August 29, 2007 Award by Administrative Law Judge (ALJ) Pamela J. Fuller. The Board heard oral argument on December 4, 2007.

APPEARANCES

Lawrence M. Gurney, of Wichita, Kansas, appeared for the claimant. Nathan D. Burghart, of Lawrence, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. In addition, at oral argument the parties agreed that claimant's average weekly wage as found by the ALJ is acceptable and no longer in dispute.

ISSUES

The ALJ issued her Award granting claimant compensation based upon a 27 percent impairment for an injury to the right forearm only, she specifically denied any compensation for claimant's left wrist, right shoulder and neck. She found that the medical and factual evidence did not support claimant's contention that his complaints relative to those parts of the body were causally related to his April 2001 shock.

The claimant requests review of this Award alleging he is permanently and totally disabled and entitled to benefits pursuant to K.S.A. 44-510c(a). Alternatively, claimant

claims he is entitled to separately scheduled benefits for injuries to other body parts based on the testimony of Drs. Murati and Brown.

Respondent argues that the ALJ's Award should be affirmed inasmuch as the weight of the evidence shows that the claimant's injury in this case is limited to the right upper extremity at the level of the forearm. Respondent, however, contends claimant's permanent impairment should be modified to 15 percent at the forearm as opined by Dr. Lucas or at most no more than the 27 percent found by Dr. Brown.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The Board finds the ALJ's findings and conclusions are accurate and supported by the law and the facts contained in the record. It is not necessary to repeat those findings and conclusions in this Order. The Board approves those findings and conclusions and adopts them as its own.

Highly summarized, on April 9, 2001, claimant received a significant electrical shock while working on a commercial freezer. The shock itself threw claimant away from the freezer. Claimant testified he experienced pain in his right arm and wrist and some pain in his left wrist as well.

The following day, April 10, 2001, the claimant reported his accident to the respondent and was sent to the emergency room where he was seen by Dr. Cook and ultimately referred to Dr. Garcia who became the treating physician. Based upon claimant's symptoms, Dr. Garcia recommended carpal tunnel surgery and a Guyon release to the right wrist.

Claimant continued to work after the accident but had ongoing problems, particularly in his right hand. Although Dr. Garcia recommended surgery to address the physical complaints, his employer asked him to continue working through the busy season. Claimant continued to work, wearing splints and braces and according to him, his left wrist hurt due to the overcompensation. Finally, on August 14, 2001, claimant had surgery for his right wrist. He never returned to work for respondent as they had no one-handed work for him. In fact, claimant has never returned to substantial gainful employment since this accident. He did attempt to start a business selling portable horse trailers, but that business has failed to generate any net income. Claimant is receiving social security retirement¹ and has only sporadically searched for employment.

¹ Claimant is presently 67 years old.

The record indicates that claimant first expressed complaints of left wrist pain in the winter of 2001, with treatment sometime in the spring of 2002 with surgery (carpal tunnel release and a Guyon release) performed in March 2004. He further testified that his right shoulder complaints did not begin until 2005 with surgery occurring in May 2006.

In making her decision, the ALJ was more persuaded by the opinions expressed by Drs. Brown and Lucas over those expressed by Dr. Murati. Dr. Murati attributed all of the claimant's complaints to his April 2001 accidental shock, including the right shoulder (which did not manifest itself until 2005) and neck complaints, which no other physician identified. Probably the most telling aspect of Dr. Murati's opinions is the fact that he saw claimant not just once but twice. He first examined claimant on April 4, 2002. And that examination revealed only complaints and a diagnosis to the right wrist. There was no mention of any symptoms in the left wrist nor of any sort of compensating for the right wrist's limitations. Likewise he mentioned nothing about the claimant's right shoulder or neck.

Similarly, Dr. Lucas testified that during his first examination in January 2002, claimant had no left wrist or right shoulder complaints. Thus, he rated claimant's permanent impairment at 14 percent of the right upper extremity. He later saw claimant again, in 2004, and was designated as claimant's treating physician. Dr. Lucas recommended that claimant have further surgery to his right hand, fusing the wrist and even later, removing some of that hardware in order to alleviate some of claimant's complaints. Dr. Lucas noted that claimant began to complain of right shoulder pain late in 2005. When asked if claimant's left wrist and right shoulder problems were attributable to the initial April 2001 accident, he testified that he did not believe they were.

Dr. Brown saw claimant on two separate occasions, once in 2003 and a second time in August 2006. He ultimately assigned a 19 percent permanent impairment to the left upper extremity and 27 percent to the right upper extremity (both at the level of the forearm). His testimony with respect to the causative aspect of the left upper extremity is somewhat unclear. Dr. Brown first testified that he believed that the electric shock was the cause of both the right and the left upper extremity problems, with the left being the result of claimant's overcompensating while working. But when cross examined on this issue, he further testified that he would have expected claimant's left wrist complaints to manifest within a few months of the initial injury.² At another point he testified within 6-8 weeks of the injury or at the latest within a few months.³

Obviously there is evidence to support both claimant and respondent's positions. The Board has carefully considered each of the physicians' opinions as well as the claimant's own testimony and concludes the ALJ's Award should be affirmed. While at

² Brown Depo. (May 3, 2007) at 21.

³ *Id.* (May 14, 2003) at 11.

least one physician has attributed all of claimant's conditions to his electrical accident, that same physician (Dr. Murati) failed to diagnose or note complaints regarding the left upper extremity (or any other complaints besides the right wrist) in an examination that occurred a year after the initial accident. Dr. Brown testified that he would have expected those left wrist complaints to emerge within 6-8 weeks or two months of the accident if the accident were the cause. And it appears that they did not come on until late 2001, at least according to claimant's testimony. Admittedly, claimant does say that immediately after the accident he had some pain in his left hand and that he overcompensated when he was working, but there are no contemporaneous medical records within the evidentiary record to substantiate this complaint.

Like the ALJ, the Board has considered all of the evidence and in light of the facts is more persuaded by the testimony of Dr. Lucas and that of Dr. Brown. Claimant's permanent impairment is limited to 27 percent his right upper extremity at the level of the forearm.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated August 29, 2007, is affirmed in all respects.

IT IS SO ORDERED.

Dated this _____ day of December, 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

I respectfully disagree with the majority. I believe the evidence establishes that both upper extremity injuries are directly related to the claimant's April 9, 2001 accident. In

addition, those injuries have rendered claimant permanently and totally disabled from engaging in substantial and gainful employment.

Consequently, claimant's award should be one for permanent total disability benefits under K.S.A. 44-510c.

BOARD MEMBER

c: Lawrence M. Gurney, Attorney for Claimant
 Nathan D. Burghart, Attorney for Respondent and its Insurance Carrier
 Pamela J. Fuller, Administrative Law Judge